Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

CHRISTOPHER A. FELIX, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

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December 1994

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QUESTIONS PRESENTED

I. Whether the pleas to Charge II and its specifications were improvident because the facts indicate the petitioner, while in correctional custody, was subjected merely to moral restraint, not physical restraint, a required element of the crime.

II. Whether the Air Force Court of Military Review, a majority of which disagreed with the original panel's decision, erred by deciding the case at bar *en banc,* on the basis that the providency of the petitioner's pleas was a "question of exceptional importance" within the meaning of Rule 17 of the Courts of Military Review Rules of Practice and Procedure.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

The petitioner, Christopher A. Felix, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered on 16 September 1994.

OPINIONS BELOW

The order and judgment of the United States Court of Military Appeals, USCMA Dkt. No. 93-0861 (C.A.A.F. 1994) is reprinted at Appendix A. The decision of the United States Air Force Court of Military Review, is reported at 36 M.J. 903 (A.F.C.M.R. 1993), and is reprinted at Appendix B.

JURISDICTION

The final order of the United States Court of Military Appeals was entered on 16 September 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1993) and 10 U.S.C.A. § 867(a) (Supp. 1993).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Court of Military Review, Rules of Practice and Procedure, (22 M.J. CXXVII, 1 March 1985), Rule 17. *En Banc Proceedings.* (a) states,

> A majority of the judges present for duty may order that any appeal or other proceeding be considered or reconsidered, except as indicated in section (c) below, by the Court sitting as a whole. Such consideration or reconsideration ordinarily will not be ordered except (1) when consideration by the full Court is necessary to secure or maintain uniformity of decision, or (2) when the proceedings involve a question of exceptional importance, or (3) when a sentence being reviewed pursuant to Article 66 extends to death.

Article 134, UCMJ, Manual for Courts-Martial (1984), sets forth the elements of the crime of escaping from correctional custody in paragraphs 70.b.(1)(b) and (c), which state, respectively, "That, while in such correctional custody, the accused was under physical restraint;" and, "That the accused freed himself or herself from the physical restraint of this correctional custody before being released therefrom by proper authority . . ."

STATEMENT OF THE CASE

On 6 February 1991, the petitioner was punished nonjudicially pursuant to Article 15, UCMJ, by being put in correctional custody. Pros.Ex. 1. On 9 and 13 February 1991, the petitioner left the correctional custody facility without permission. Pros.Ex. 1. These departures violated Operating Instruction 39-6, of the Correctional Custody Facility. Pros.Ex. 4 and 5.

Petitioner was charged with, and entered conditional guilty pleas to, failing to obey an order not to consume alcohol (Article 92) and escaping from correctional custody (Article 134). During the providency inquiry, the petitioner agreed with the judge's suggestion that by being in correctional custody, the petitioner was under physical restraint. R. 34, 36. Later, in his unsworn statement, the petitioner said that there was "no security in [the correctional custody facility] whatsoever" and that he "just walked out the back door." R. 107.

On appeal to the Air Force Court of Military Review, the case was initially decided by a panel consisting of Senior Judge Leonard, Judge James, and Judge Johnson. *United States v. Felix,* 36 M.J. 903, 913, n. 11. (A.F. C.M.R. 1993) (James, J., dissenting). That panel of judges "voted and agreed on an opinion that set aside all the findings of guilty." *Id.* On 2 October 1992, the Court decided to consider the case *en banc.* On 10 February 1993, in a decision consisting of four separate opinions, the majority set aside the findings as to Charge I and its specification and reduced the period of confinement from five months to four months pursuant to a reassessment of sentence. *United States v. Felix,* 36 M.J. 903 (A.F.C.M.R. 1993). The Court of Military Appeals, on 16 September 1994 affirmed that Court's decision. The Court found that Rule 17 was not an exclusive list of the time when *en banc* review by the Court of Criminal Appeals is permissible. The Court, in deciding that the plea was provident, relied upon the fact that the appellant had stated, during the plea inquiry, that he was under physical restraint. Thus, the Court failed to address the salient issue of whether the evidence which came to light after the inquiry were inconsistent with the appellant's original statement, rendering the plea improvident.

REASONS FOR GRANTING THE WRIT

I. THE PLEAS TO CHARGE II AND ITS SPECIFICATIONS ARE IMPROVIDENT SINCE THE FACTS INDICATE THAT PETITIONER'S CORRECTIONAL CUSTODY CONSISTED OF NO PHYSICAL RESTRAINT.

Where matters inconsistent with a plea of guilt are presented at trial, the guilty plea cannot stand. Article 45(a), UCMJ, 10 U.S.C. § 845(a). The petitioner's two statements, as set forth above, were in substantial conflict with the petitioner's earlier concession that his status of being in correctional custody meant he was under physical restraint, as embraced by Article 134, paragraph 70. The military judge was required to resolve the conflict or enter pleas of not guilty on behalf of the petitioner. Article 45(a), UCMJ, 10 U.S.C. § 845(a).

Of the four elements constituting the offense of escape from correctional custody, the second element – that "while in such correctional custody, the accused was under physical restraint," MCM, Part IV, paragraph 70(b)(1)(b) – is where the problem with the petitioner's case rests. In resolving this problem against the petitioner, the Court of Military Appeals relied upon the reading of paragraph 70(c)(1), MCM, Part IV (United States, 1984), which in effect says that escape from correctional custody is when a person in correctional custody "casts off" *any* of the physical restraint that has been imposed.

The majority decision of the Air Force Court of Military Review, in this case, cited Part V of the MCM and Department of the Army Pamphlet 27-9, for the proposition that one "in correctional custody is *always* under physical restraint." *United States v. Felix,* 36 M.J. 903, 906-907 and n. 8 (A.F.C.M.R. 1993). In reaching this conclusion the Air Force Court of Military Review noted that "The fact that correctional custody anticipates and man-

dates periods when the correctee is subject to moral restraint does not cancel the inherent status of physical restraint." *Id.* at 908. The court's conclusions on this matter render the second element of the offense unnecessarily redundant.

Further, the petitioner's statement that there was no security in the facility was supported by the government's evidence at trial. Prosecution exhibit 5 repeatedly refers to the correctional custody system as operating on an honor system. Trial counsel repeatedly argued that the petitioner violated this honor system and that he must now be physically restrained behind bars. R. 123, 126. Significantly, the monitor of the correctional custody facility said that after the petitioner departed the facility, the rules were changed to require the monitor to perform two bedchecks. R. 70-74. Both before and after the petitioner's departure, the "monitor" is allowed to sleep during the evening hours. In the end, all of the evidence was consistent with the "essence" of correctional custody at Nellis Air Force Base, involving nothing more than mere moral suasion during the evening hours, not physical restraint.

There was substantial conflict between the statements during the guilty plea and the evidence presented during sentencing. Therefore, the military judge was required to resolve the conflict or enter pleas of not guilty on behalf of the petitioner. R.C.M. 910(h)(2).

II. THE AIR FORCE COURT OF MILITARY REVIEW, A MAJORITY OF WHICH DISAGREED WITH THE ORIGINAL PANEL'S DECISION, ERRED BY DECIDING THE CASE AT BAR *EN BANC*, APPARENTLY UNDER THE GUISE THAT THE PROVIDENCY OF THE PETITIONER'S PLEAS WAS A "QUESTION OF EXCEPTIONAL IMPORTANCE" WITHIN THE MEANING OF RULE 17 OF THE COURTS OF MILITARY REVIEW RULES OF PRACTICE AND PROCEDURE.

There was substantial disagreement among the Judges of the Air Force Court of Military Review as to the appro-

priateness of *en banc* consideration. *Felix,* 36 M.J. at 913, n.11. "There was no conflict among decisions of different panels on any issue in this case, and the punishment obviously does not extend to death." *Felix,* 36 M.J. at 913. The providency of a plea is not an unusual issue to be raised before the appellate judiciary. And although the issue is of exceptional importance to the petitioner, it is not a case that would ordinarily be viewed as exceptionally important to military justice.

As Judge Heimburg pointed out in his concurring opinion, the majority and the dissent hold significant differences of opinion on the nature of physical restraint as it applies to correctional custody. *Felix* at 912. However, as Judge Heimburg stated, resolution of the issue in this case did not require adoption of either view, since the issue was simply whether the petitioner's unsworn statement created a substantial conflict with his guilty plea. *Id.*

The majority, disagreeing with the original result reached by Panel 3 and apparently some of the dicta contained in the opinion, determined to bring the case before the Court, sitting *en banc.* Use of this procedure, whenever there is disagreement among the judges of the Courts of Criminal Appeals, does not appear to be the intent of the authors of the Court of Criminal Appeals Practice and Procedures, since specific prerequisites were denoted for *en banc* consideration.

The Air Force Court of Review's decision to consider the case *en banc* resulted in substantial prejudice to the petitioner, in that a decision had already been made by Panel 3 to set aside all of the findings of guilt and the sentence. The Court of Military Appeals stated in *United States v. Flowers,* 26 M.J. 463 (C.M.A. 1988) that it was concerned with proper compliance by the Courts of Military Review with Rule 17. The clear intent of Rule 17 is that a panel's decision is only to be disturbed under extra-

ordinary circumstances. The petitioner faced no death sentence. All four opinions agree on the standard to be applied when determining whether or not a plea was provident – therefore, there was no lack of uniformity in decisions. The decision of Panel 3 should have been left alone.

CONCLUSION

The questions presented are important to providing a meaningful understanding of what conduct is criminally proscribed under paragraph 70, part IV, MCM and the scope of the Court of Criminal Appeal's power to exercise *en banc* consideration or reconsideration of previously decided cases.

Respectfully submitted,

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December 1994

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 93-0861
CMR No. S28476

UNITED STATES, APPELLEE,

v.

CHRISTOPHER A. FELIX, AIRMAN
U.S. AIR FORCE, APPELLANT.

Argued April 19, 1994.
Decided Sep. 16, 1994.

Counsel

For Appellant: *Colonel Jay L. Cohen* (argued); *Captain Robert I. Smith* (on brief); *Lieutenant Colonel Frank L. Spinner.*

For Appellee: *Colonel Jeffery T. Infelise* (argued); *Captain Jules D. Silberberg* (on brief); *Major Barnard N. Madsen.*

Military Judge: Kenneth D. Randall

Opinion of the Court

COX, Judge:

In the case at bar we are asked to decide the providence of appellant's guilty pleas to two specifications of escaping

from correctional custody, and whether the Court of Military Review erred in deciding to review that issue, *en banc*.[1] We first consider the issue of *en banc* review.

Appellant was tried by special court-martial composed of officer members. Pursuant to his conditional pleas, he was convicted of failure to obey an order not to consume alcohol, and of escaping from correctional custody (two specifications), in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 USC §§ 892 and 934, respectively. He was sentenced to a bad-conduct discharge, confinement for 5 months, and reduction to the lowest enlisted pay grade. The convening authority approved the sentence.

On appeal, appellant's case was originally heard by a panel of three Court of Military Review judges (Senior Judge Leonard and Judges James and Johnson), who agreed to set aside all findings of guilty. 36 MJ 903, 913

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[1] The granted issues are:

I

WHETHER THE PLEAS TO CHARGE II, BOTH SPECIFICATIONS, ARE IMPROVIDENT BECAUSE THE FACTS INDICATE THE RESTRAINT IMPOSED ON APPELLANT IN CORRECTIONAL CUSTODY WAS MORAL, NOT PHYSICAL.

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW, A MAJORITY OF WHICH DISAGREED WITH THE ORIGINAL PANEL'S DECISION, ERRED BY DECIDING THE CASE AT BAR *EN BANC*, APPARENTLY UNDER THE GUISE THAT THE PROVIDENCY OF APPELLANT'S PLEAS WAS A "QUESTION OF EXCEPTIONAL IMPORTANCE" WITHIN THE MEANING OF RULE 17 OF THE COURTS OF MILITARY REVIEW RULES OF PRACTICE AND PROCEDURE.

n.11 (AFCMR 1993) (en banc) (James, J., concurring in part and dissenting in part). During "off-panel" circulation, a Court of Military Review judge who did not sit on the panel suggested *en banc* consideration of appellant's case, and a majority of the court agreed. *Id.* The *en banc* court heard appellant's case and produced four opinions.[2]

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[2] The opinion of Judge James, with whom Senior Judge Leonard and Judge Johnson joined, concurring-in-part and dissenting-in-part, attacks the propriety of *en banc* reconsideration of appellant's case following a hearing before a three-judge panel. Judge James opined:

> Rule 17 of the Courts of Military Review Rules of Practice and Procedure, 22 MJ CXXVII, CXXXIII, provides that such reconsideration "ordinarily will not be ordered except (1) when consideration by the full Court is necessary to secure or maintain uniformity of decision, or (2) when the proceedings involve a question of exceptional importance, or (3) when a sentence being reviewed . . . extends to death." There was no conflict among decisions of different panels on any issue in this case, and the punishment obviously does not extend to death.
>
> One might question whether such a subjective standard as "exceptional importance" is so devoid of discernible criteria as really to constitute *no* rule. Were that the case, such a judicial mugging as this one would be in violation of the statute's "in accordance with rules" clause. [Art. 66(a), Uniform Code of Military Justice, 10 USC § 866(a).]. . . .
>
> The decision of the majority to reconsider this case *en banc* can be justified only on the basis that this is a case of exceptional importance, and it demonstrates that the standard in the rules is interpreted by this Court as broad enough to cover any situation where the majority disagrees with a panel's decision. The question of how to properly charge offenses against correctional custody meets no plausible standard of "exceptional importance." Surely this excursion into a seldom visited back alley of military justice is not what the Congress and the Judge Advocates General had in mind when they gave us permission to shoot our toes off. . . .

Id. at 913 n.11.

The majority set aside the findings of guilty of failure to obey a lawful order not to consume alcohol; affirmed the remaining findings; and reassessed appellant's sentence to include a bad-conduct discharge, confinement for 4 months, and reduction to the lowest enlisted level. 36 MJ at 910-11.

Article 66(a), UCMJ, 10 USC § 866(a), provides that "[a]ny decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules" as are prescribed by the Judge Advocates General. Rule 17(a) of the Courts of Military Review Rules of Practice and Procedure sets guidelines for *en banc* proceedings:

> A majority of the judges present for duty *may order that any appeal or other proceeding be considered or reconsidered,* except as indicated in section (c) below, by the Court sitting as a whole. Such consideration or reconsideration ordinarily will not be ordered except (1) when consideration by the full Court is necessary to secure or maintain uniformity of decision, or (2) when the proceedings involve a question of exceptional importance, or (3) when a sentence being reviewed pursuant to Article 66 extends to death.

22 MJ CXXXIII (emphasis added).

The first category of circumstances under which *en banc* review is usually appropriate is where it is necessary for uniformity. While *en banc* review is obviously helpful where panels have reached inconsistent results, it might also be deemed necessary by the courts where there is disagreement among the judges and a panel might reach a result that would make what is considered to be bad law or law contrary to the majority view. In either case, review by the court sitting as a whole is entirely appropriate.

The second category where *en banc* consideration is warranted is where a question of "exceptional importance" is involved.[3] What is of exceptional importance is a question for the majority of the Court of Military Review to determine. Deciding whether defining a crime, preventing bad precedent, or preventing future inconsistencies is of exceptional importance is within the court's domain.

Additionally, we note that Rule 17 does not provide an exclusive list of appropriate circumstances for *en banc* review, but merely suggests when Courts of Military Review should probably review cases *en banc*. The term "ordinarily" precedes the list of circumstances where review seems appropriate, and again, defining what is ordinary, out of the ordinary, or exceptional, is within the province of the Court of Military Review. As we stated in *United States v. Flowers,* 26 MJ 463, 465 (CMA 1988), "we are confident that the court is cognizant of its own rules and complies therewith." We will not disturb the court's decision to reconsider appellant's case *en banc*.

Next, we turn to the providence of appellant's guilty pleas. Appellant pleaded guilty to two specifications of escaping correctional custody, but on appeal, he challenges the providence of those pleas, claiming he was under moral, rather than physical, restraint. The offense of escaping from correctional custody is "the act of a person undergoing the punishment of correctional custody pursuant to Article 15, [UCMJ, 10 USC § 815,] who, before being set at liberty by proper authority, casts off any physical restraint imposed by the custodian or by the

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[3] The issue as framed by appellant asks whether his case was one of "exceptional importance" warranting *en banc* reconsideration. The court's rationale for reviewing appellant's case *en banc* was never articulated, and we will not limit our discussion of reconsideration *en banc* to that on the basis of "exceptional importance."

place or conditions of custody." Para. 70(c)(1), Part IV, Manual for Courts-Martial, United States, 1984. The elements of that offense are as follows:

> (a) That the accused was placed in correctional custody by a person authorized to do so;
>
> (b) That, while in such correctional custody, the accused was under physical restraint;
>
> (c) That the accused freed himself or herself from the physical restraint of this correctional custody before being released therefrom by proper authority; and
>
> (d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Para. 70(b)(1).

Appellant was put into correctional custody by his squadron commander who was authorized to place him in custody [*see* Art. 15(b)(2)(H)(ii)], and appellant knew he was not allowed to leave the correctional custody facility without the permission of a Correctional Custody Monitor unless he was assigned to a work detail outside the facility. He admitted that on February 9, 1991, he "snuck out" of the facility without proper authorization and went to the Slots-of-Fun Casino where he had a couple of beers before returning to the facility. He was the only one in correctional custody, "was bored," and "went out through the back door." Appellant stated there was "no security in that place whatsoever." He was gone approximately 3½ to 4 hours. He left the facility again on February 13, 1991, without authorization. He went out through the back door while the monitor was in his office and went to an apart-

ment to place a phone call to his girlfriend; he returned to the facility after being gone about an hour.

The military judge explained the elements of the offense to appellant twice. Appellant said he understood the elements and said, specifically, that he was "under physical restraint" imposed by correctional custody. Following the providence inquiry, *United States v. Care,* 18 USCMA 535, 40 CMR 247 (1969), appellant reaffirmed his desire to plead guilty.

Article 15 describes correctional custody as "the physical restraint of a person during duty or nonduty hours and may include extra duties, fatigue duties, or hard labor."[4] The Manual for Courts-Martial discusses two different offenses against correctional custody: escape from correctional custody and breach of correctional custody. Para. 70(b), Part IV.

Although there are two degrees of offenses described in the Manual, by definition there is only one form of correctional custody. "Correctional custody" equals physical restraint. If the conditions of a facility designated by the ser-

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[4] The Court of Military Review noted:

> The President defines correctional custody as "the physical restraint of a person during duty or non-duty hours, or both, imposed as a punishment under Article 15. . . ." [P]aragraph 5(c)(4) [Part V, Manual for Courts-Martial, United States, 1984]. This definition is taken almost verbatim from the Senate Report explaining the 1962 amendment to Article 15. Prior to defining correctional custody, the Senate Armed Services Committee stated as follows: "The bill contains a form of *physical restraint* not authorized in existing law, and termed 'correctional custody.'" S.Rep.No. 1911, 87th Cong., 1st Sess. 7 (1962) (emphasis added).

36 MJ at 906-07. We do not consider the President's description of correctional custody inclusive of all possible conditions of correctional custody punishment. In other words, we do not consider correctional custody, by definition, to include physical restraint.

vicemember's commander as the "correctional custody" facility do not provide for physical restraint, then the facility is something other than a "correctional custody" facility. A servicemember ordered to such a facility simply is not in "correctional custody"; rather, he or she is "restricted."[5] The majority opinion of the Court of Military Review described it this way:

> [I]n the absence of evidence to the contrary, a correctee is under physical restraint whenever he or she has been committed to a designated correctional custody setting (a centralized base facility or designated area within a facility) under the supervision of a monitor, and with knowledge he or she is not to leave except under specified conditions.

36 MJ at 908.

In this case, appellant admitted to being in correctional custody. The Government, by virtue of appellant's admissions, stipulations of fact, and pleas of guilty, was relieved from proving this fact by actual testimony. In light of the clear and unambiguous response by the accused, we will not speculate as to the true condition of the correctional custody facility at Nellis Air Force Base, Nevada. *See United States v. Prater,* 32 MJ 433 (CMA 1991); *United States v. Harrison,* 26 MJ 474 (CMA 1988).

Two other observations are called for in light of the distinction made in the Manual for Courts-Martial between "breaches" of and "escapes" from correctional custody. First, both offenses flow from the same fountainhead—the lawful imposition of Article 15 nonjudicial punishment. The lawful imposition of the punishment is no more or less than a lawful order of the commanding

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[5] This is analogous to being "pregnant." Either one is or one isn't.

officer requiring a servicemember to perform a lawfully imposed duty. If a servicemember refuses to do that duty, the offense could be punished under Article 90, UCMJ, 10 UCMJ § 890, as a willful disobedience offense. Thus, the Article 134 offenses are in reality redundant and most likely are there for sentencing considerations rather than to create new offenses under the rubric of general disorders. Why the President chose to treat breaches of correctional custody as less serious offenses (for to some they appear more serious than many other Article 90 offenses) than other disobedience cases escapes us, but there they are.

The second observation is that breaches of correctional custody and escapes are distinguishable only if there is correctional custody in the first instance. The question of whether a particular facility or situation constitutes "correctional custody" is a question of fact and, as stated earlier, there can be no correctional custody without physical restraint. Once that fact is established, the next question is whether the accused "escaped" or whether he was lawfully free of the physical restraints (for example, authorized to report for duty elsewhere during duty hours), and "breached" the custody by not returning thereto as duly required.

Notwithstanding these distinctions, in this case we are convinced appellant knowingly and voluntarily admitted guilt, gave up trial rights, and gave up defenses to the charges. *United States v. Penister,* 25 MJ 148, 153 (CMA 1987) (Cox, J., concurring). While arguably appellant's unsworn statement casts some doubt on the effectiveness of the physical restraints employed in this correctional custody facility, they do not render appellant's pleas improvident.[6]

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[6] Article 45(a), Uniform Code of Military Justice, 10 USC § 845(a), states:

> If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the

At no time did he dispute the fact that he was duly required to be in the "designated correctional custody setting."

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges CRAWFORD, GIERKE, and WISS concur.

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plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

See RCM 910(h)(2), Manual, *supra*.

APPENDIX B

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM S28476

UNITED STATES

v.

AIRMAN CHRISTOPHER A. FELIX, FR566-11-8921
UNITED STATES AIR FORCE

---

10 February 1993
____ M.J. ____

Sentence adjudged 25 February 1991 by SPCM convened at Nellis Air Force Base, Nevada. Military Judge; *Kenneth D. Randall.*

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: *Colonel Jeffrey R. Owens, Lieutenant Colonel Terry J. Woodhouse, Major George P. Clark, Captain Michael D. Burt,* and *Captain Rovert I. Smith.*

Appellate Counsel for the United States: *Major Paul H. Blackwell, Jr., Major Jeffrey C. Lindquist,* and *Captain James B. Wager, Jr.*

En Banc

DIXON, O'HAIR, LEONARD, SNYDER, MCLAUTHLIN, JAMES, GRUNICK, JOHNSON, and HEIMBURG Appellate Military Judges.

Opinion of the Court

SNYDER, Judge:

Pursuant to conditional pleas of guilty,[1] appellant was convicted by special court-martial of failure to obey a lawful order, and two specifications of escape from correctional custody.[2] He was sentenced to a bad-conduct discharge, 5 months confinement, and reduction to E-1. Appellant raises five assignments of error, of which three merit extensive discussion. We granted partial relief on the findings and sentence.

Appellant now claims his pleas to the specifications and charge, Charge II, are improvident. The basis for his assertion is that comments in his unsworn statement during sentencing raised matter inconsistent with his plea. Specifically, he suggests the restraint he breached was moral, rather than physical.[3] Because of the salient facts of the instant case, for appellant's contention to prevail, we must accept the premise that a person placed in a designated, supervised correctional custody facility is not *thereby* under physical restraint. Indeed, appellant's supplemental brief argues as much. We disagree. Absent some

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[1] R.C.M. 910(a)(2). We continue to remind staff judge advocates that, if the issue preserved by a conditional guilty plea is not *case dispositive*, it should not be accepted.

[2] Articles 92 and 134, UCMJ (10 U.S. §§ 992, 934, (1988)).

[3] As is usually the case, this issue would have been avoided with a more thorough providence inquiry, as well as a more comprehensive stipulation of fact.

evidence contradicting appellant's concession that he was under physical restraint in a centralized, monitored correctional custody facility, we decline to hold that his unsworn statement raising the possibility that the physical restraint was ineffective was a matter inconsistent with his pleas of guilty to escape from correctional custody.

Absent evidence demonstrating appellant was being controlled by moral restraint at the time of the offense, we find provident, his pleas that he escaped by casting off the restraint *of a monitored, centralized correctional custody facility,* regardless of the means by which he did so.

I. FACTS

The following dialogue transpired between appellant and the military judge:

MJ: And are you, were there in fact limits on where you could go, within correctional custody, without the permission of the correctional custody monitor?

Acc: Was there an outline, you mean—

MJ: Yes.

Acc: —as far as I could go?

MJ: Um-hum.

Acc: I don't remember seeing anything like that.

MJ: No, but I mean—

Acc: No, I —

MJ: —did you understand that you were under physical restraint

Acc: —yes, sir.

MJ: —imposed by this correctional custody?

Acc: Yes, sir.

MJ: And that you would need the permission of the correctional custody monitor in order to go

out of the correctional custody facility unless you were out on some kind of a work detail or something like that?

Acc: Yes, sir.

MJ: And you knew of the limits, the limitations placed on you with, in terms of physical restraint, by this,—

Acc: Yes, sir.

MJ: —by your status of being in correctional custody?

Acc: Yes, sir.

MJ: Okay. Now did you, on the 9th of February, free yourself from the physical restraint that had been imposed upon you?

Acc: Yes, sir.

MJ: What'd you do? Did you go downtown?

Acc: Went downtown, sir.

* * * * *

MJ: Now, on the 13th of February, was your status still the same as it was on the 9th of February,—

Acc: Yes, it was.

MJ: —as being in correctional custody?

Acc: Yes, sir.

MJ: And again, you were aware of that status, is that correct?

Acc: Yes, sir.

* * * * *

MJ: Okay. What did you do on the 13th of February to escape from correctional custody?

Acc: I needed to go use the phone, sir . . . and I left through the back door.

MJ: And did you in fact surreptitiously leave the correctional custody facility without permission from anyone who could give you permission to leave?

Acc: Yes, sir.

A stipulation of fact entered into by all parties at trial reflects the appellant left the correctional custody facility and went to a Las Vegas casino where he consumed beer. While there, he remarked to a noncommissioned officer working part-time at the casino that "I just snuck out of CC." Regarding the 13 February offense, the stipulation of fact reflects the appellant departed the facility "out the back door while the CC monitor was in his office."

II. CORRECTIONAL CUSTODY

Appellant argues that finding physical restraint on the facts of the instant case renders paragraph 70, MCM, redundant. His argument refers to the second element of the offense, which requires the correctee to be under physical restraint while in correctional custody.[4] MCM, Part IV, paragraph 70(b)(1)(b) (1984). The essence of this argument is that the trial judge should have inquired into what extent, if any, the facility deterred or hampered appellant's freedom of movement. This argument fails to account for the essence of correctional custody.

Correctional custody is an authorized nonjudicial punishment pursuant to Article 15, UCMJ (10 U.S.C. § 815). The President defines correctional custody as "the physical restraint of a person during duty or nonduty hours, or both, imposed as a punishment under Article 15.

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[4] Appellant completes his logical circle by concluding that, if so, then that element would require the instructions to state, "while in such correctional custody, the accused was in correctional custody."

. . ." MCM, 1984, Part V, paragraph 5(c)(4) (1984). This definition is taken almost verbatim from the Senate Report explaining the 1962 amendment to Article 15. Prior to defining correctional custody, the Senate Armed Services Committee stated as follows: "The bill contains a form of *physical restraint* not authorized in existing law, and termed 'correctional custody'." S. Rep. No. 1991, 87th Cong., 1st Sess. 7 (1962) (emphasis added).

Although there is a paucity of decisions involving correctional custody, the few in existence do not contradict the crystal clear intent of Congress and the President to make correctional custody a form of physical restraint, especially when the issue actually before the Court is separated from the collateral aspects. In *United States v. Carson*, 15 U.S.C.M.A. 407, 35 C.M.R. 379 (1965), attention might be diverted to the fact the correctee was locked in a barracks room. The issue before the Court, however, was whether the members had to find the correctional custody was legally imposed as an element of the offense of escape from correctional custody. The Court held that was a question of law and not an element of the offense for the factfinders. The decision placed no emphasis whatsoever on the fact the accused was actually locked up while undergoing correctional custody. In fact, the instructed elements required the members only to find the accused was *in* correctional custody and he freed himself from the restraint of that custody before proper release.

In *United States v. Mackie*, 16 U.S.C.M.A. 14, 36 C.M.R. 170 (1966), a case involving breach of correctional custody, appellate defense counsel argued to the Court that, because correctional custody and confinement differed only in semantics, correctional custody should be imposed only by sentence of court-martial. 36 C.M.R. at 174. The Court disposed of the issue by emphasizing the correctee's right to demand trial by court-martial in lieu

of Article 15 proceedings. There was no effort by the Court to articulate a position that correctional custody is not physical restraint.

This same issue was revisited during the United States Court of Military Appeals' decisions applying *Argersinger v. Hamlin*, 407 U.S. 25 (1972), to UCMJ practice.[5] The argument was, because of the absence of a real distinction between correctional custody and confinement, Article 15 punishments which imposed correctional custody without representation by counsel should be inadmissible in a subsequent trial by court-martial as are summary courts-martial convictions which impose confinement without the accused being represented by counsel.[6] *United States v. Shamel*, 22 U.S.C.M.A. 362, 47 C.M.R. 116 (1973). To Judge Quinn, correctional custody resembled restriction more than confinement, but only because of the differences in treatment accorded correcteees *vis a vis* prisoners, not on the absence of physical restraint. His final comparison was to detention after school. 47 C.M.R. at 117. Although they differed on the disposition of the ultimate issue, the other two judges could not discern a substantive difference between correctional custody and confinement. *Shamel*, 47 C.M.R. at 118, 119 (dincan, J., dissenting); *United States v. Alderman*, 22 U.S.C.M.A.

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[5] *Argersinger* held that, even in misdemeanor actions, one cannot be sentenced to confinement, unless represented by counsel. This decision impacted the manner by which the armed forces administer trials by summary courts-martial. *See* Article 20, UCMJ (10 U.S.C. § 820 (1988)); R.C.M. 1301. Because Article 15 provides for correctional custody as an authorized punishment, the issue spilled over to Article 15 actions.

[6] *Argensinger* impacts admissibility under R.C.M. 1001(b)(3) for aggravation purposes, and under R.C.M. 1003(d)(1) and (2) for sentence enhancement purposes. It does not impact admissibility for impeachment under Mil. R. Evid. 609.

298, 46 C.M.R. 298, 308 at n.1 (1973) (Darden, C.J., dissenting).

In short, there is nothing in those decisions to indicate correctional custody is not physical restraint.

Appellant's resort to comparisons with the offense of escape from confinement is persuasive, but in a manner contrary to his position.[7] Appellant mistakenly interprets our decision in *United States v. Hodge*, 50 C.M.R. 445 (1975), to mean that more than a casting off of confinement status must be shown to constitute an escape, and, from that interpretation concludes the same holds for correctional custody. In fact, the part of *Hodge* appellant relies upon provides that evidence which shows the procedural requirements for confinement were accomplished is not proof, *per se*, that a person actually was placed in confinement. We held that, although Hodge had not been physically placed in the confinement facility, because the procedural steps were properly completed, and he was committed to the corrections supervisor who could not refuse to accept him, he was in confinement. Hodge's confinement *status* having attached, his flight from his guards *en route* to the facility constituted an escape from confinement, not an escape from custody. 50 C.M.R. at 448.

Any doubt in this regard should have been eliminated by our decision in *United States v. Cornell*, 19 M.J. 735 (A.F.C.M.R. 1984), which reemphasized our holding in *United States v. Maslanich*, 13 M.J. 611 (A.F.C.M.R. 1982). Once confinement status attaches, the throwing off of that status by any means, whether by physically overpowering a guard, picking a lock, or by simply walking away, constitutes an escape. *See United States v. Felty*,

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[7] Although correctional custody is physical restraint, it is not confinement. Consequently, the comparison of decisions on the two be read in that light.

12 M.J. 438 (C.M.A. 1982). In *Cornell* we affirmed an escape from confinement where a minimum custody prisoner (who did not require an escort, etc.) left the installation without permission, rather than going to his stated destination.

The fact that correctional custody anticipates and mandates periods when the correctee is subject to moral restraint does not cancel the inherent status of physical restraint.[8] This factor is reflected in the Secretary of the Air Force's (SAF) implementation of the correctional custody provisions of Article 15. The Air Force concept states, in part, "[T]he deprivation of liberty is a severe punishment to be carefully considered and imposed only when it is necessary to closely hold the offender in a treatment setting." Air Force Regulation 125-35, *Correctional Custody*, para. 2 (4 September 1981). AFR 125-35 does not reflect any intent on the part of SAF to prosecute correctional custody offenses solely by charging breach of correctional custody, as the Secretary of the Army apparently has done. *See United States v. Kellner*, 16 M.J. 524 (A.C.M.R. 1983). We note this is a policy decision by the Army which has no effect upon the essence of a correctee's status while in custody.

Comprehensive analysis of correctional custody reveals that moral restraint is present when the correctee is outside or beyond the designated, monitored correctional

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[8] To help the factfinders focus on whether a correctee has actually committed a breach of correctional custody as opposed to an escape, the instruction on breach cautions as follows:

> Although a person in correctional custody is *always* under physical restraint, this offense involves the breach of other specific limitations upon a person's freedom of movement while under the *physical restraint* (emphasis added).
>
> Department of The Army Pamphlet 27-9, *Military Judges' Benchbook*, Change 1, para. 3-136 (18 February 1985).

custody setting, e.g., when performing one's normal duties or when on unsupervised details, and when following designated routes to and from the correctional custody facility. When this standard is applied, the language of MCM, Part IV, para. 70(b)(1)(b)(1984) is not redundant.

Therefore, in the absence of evidence to the contrary, a correctee is under physical restraint whenever he or she has been committed to a designated correctional custody setting (a centralized base facility or designated area within a facility or designated area within a facility) under supervision of a monitor, and with knowledge he or she is not to leave except under specified circumstances.

III. PROVIDENCY OF PLEAS

A. Pleas to Escape From Correctional Custody

With these salient legal principles in mind, we now turn to appellant's pleas. Although appellant pleaded guilty, it is axiomatic that if he set up matters inconsistent with that plea *at trial*, or pleaded improvidently, his guilty pleas cannot stand. Article 45(a), UCMJ, 10 U.S.C. § 845(a). More than a possible ingenious conflict is required. There must be evidence of a substantial conflict with the accused's plea. *United States v. Logan*, 22 U.S.C.M.A. 349, 47 C.N.R. 1 (1973). However, we also must bear in mind appelant's pleas precluded the Government from putting on a more detailed case and developing the facts. *United States v. Burnette*, 35 M.J. 58 (C.M.A. 1992). Accordingly, for us to set aside appellant's pleas, the record must show a substantive basis in law and fact for questioning his guilty pleas. *United States v. Prater*, 32M.J. 433 (1991). Further, an inconsistency is not generated by the absence of evidence from the record, but from the record's entirety. The same holds true for providency. Although additional evidence may be desirable, if the record in its

entirety reflects appellant knew the elements of the offense to which he pleaded guilty and admitted freely, even if the trial judge did not fully explain them, and there is a factual basis for his pleas, the pleas will stand. *United States v. Jones*, 34 M.J. 270 (C.M.A. 1992).

The Stipulation of Fact reflects appellant was committed to Nellis AFB's Correctional Custody Facility. As indicated above, appellant admitted he knew he was under physical restraint by virtue of his status of being in correctional custody and that he could not leave the facility without permission. Nowhere in the record is there an indication the facility was viewed as moral restraint during evening hours. In fact, appellant avoided a monitor to depart on the second occasion. We may reasonably infer the monitor also was on duty during his first departure. During the providency inquiry into the second escape, the trial judge specifically referred appellant back to his responses on the first escape to ensure appellant was following him.

The MCM defines escape from correctional custody as:

> The act of a person undergoing the punishment of correctional custody pursuant to Article 15, who, before being set at liberty by proper authority, casts off *any physical restraint imposed by the custodian or by the place or conditions of custody* (emphasis added).

MCM, Part IV, paragraph 70c(1) (1984). Appellant's responses to the trial judge clearly reflect acts which fall within that definition. His leaving without permission cast off a restraint imposed by the custodian, in the form of the monitor, as well as the place of his custody, the designated facility. It was not essential for the trial judge to ascertain *how* appellant cast off the physical restraint and his status imposed upon him. Appellant's status while in the moni-

tored facility transcended whether the back door was locked, or whether the facility even had locks and bars. Appellant knowingly and freely admitted to his status of physical restraint by being in correctional custody and escaping thereform. His pleas were provident. *United States v. Burnetter*, 35 M.J. 58 (C.M.A. 1992); *United States v. Jones*, 34 M.J. 270 (C.M.A. 1992); *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991).

We also find appellant's pleas were consistent throughout the entire trial. During appellant's unsworn statement, defense counsel asked, "how'd you actually get out?" Appellant responded, "there's no security in that place whatsoever. It's just, I went out through the back door." We do not view this remark as matter inconsistent with an admission of escape, but mere rationalization by appellant to justify his behavior.[9] *United States v. Penister*, 25 M.J. 148 (C.M.A. 1987). To state, in essence, had he been chained to his bed, or locked in his room, he would not have left, is to state the obvious. The absence of security devices does not convert appellant's restraint to moral restraint. Neither does his rationalization render his comment substantively inconsistent with his plea. *Penister*, 25 M.J. at 153 (Cox, J., concurring).

B. Plea to Failure To Obey An Order

As a result of appellant taking the pleasure of a beer during his first sojourn from correctional custody, he was charged with failure to obey a lawful order. The act was alleged as a violation of Correctional Custody Operating

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[9] Unlike our dissenting brethren, we do not believe it necessary to look beyond appellant's pleas to ascertain "how much" physical restraint was imposed upon him while in the facility. Appellant's quip while at the casino reflects his knowledge he had to bypass more than his personal moral recognizance to leave the facility.

Instruction 39-6, para. 2e. Its specific title, "Correctee Honor System."

We find this "order" to be so broad and vague that it amounts to no order at all. Although the Instruction cautions the reader that, "Violations of the honor system . . . may be cause for disciplinary action," it falls short of being sufficiently clear and definite to place one on notice of the prohibited conduct. *See generally United States v. Benway*, 19 U.S.C.M.A. 345, 41 C.M.R. 345 (1970); *United States v. Baker*, 18 U.S.C.M.A. 504, 40 C.M.R. 216 (1969); *United States v. Hogsett*, 8 U.S.C.M.A. 681, 25 C.M.R. 185 (1958). For example, the provision supposedly forbidding the consumption of alcohol is under the heading of: "The following will not be condoned: . . . consumption of alcohol." Also not to be condoned are: quibbling and evasiveness, profanity (not defined), attitudes (non-specified), alterations, infringements upon privacy, and the refusal to render assistance to those in need. On balance, the Instruction reads more like a civics lesson than a militry order. Consequently, the Instruction, as a whole, fails to state a military order enforceable under Article 92, UCMJ. *United States v. Scott*, 22 U.S.C.M.A. 25, 46 C.M.R. 25 (1972).

There remains the issue of our possibly approving a finding of the lesser offense of dereliction of duty. Where a providence inquiry fully aprises an accused of the elements of an included offense as part of the elements of the charged offense, and an accused's responses knowingly and clearly admits the included offense, we may approve an included offense on appeal. *See United States v. Sassaman*, 32 M.J. 687 (A.F.C.M.R. 1991); *Cf. United States v. Brown*, 18 M.J. 360 (C.M.A. 1984).

During his providency inquiry, appellant admitted he had a duty to obey the Correctional Custody Instruction, and he knowingly consumed alcohol contrary to the

Instruction. On their face, these admissions appear to constitute the offense of dereliction of duty.[10] The Instruction's inherent deficiencies, however, constrain us to decline to approve a conviction of the lesser offense of dereliction of duty, appellant's admissions, notwithstanding.

In addition to the Instruction's broad hortatory provisions noted above, the Instruction essentially incorporates all the UCMJ's punitive articles (Articles 77 through 134) under items which are not condoned. Obviously, this Instruction is not needed to prevent thefts or assaults, for Articles 121 and 128 prohibit such misconduct. This instruction, in essence, merely encourages Nellis AFB Correctional Custody correctees to be good citizens and obey the law, a duty to which they are subject at all times without the help of the Instruction. Therefore, we disapprove entirely on Charge I and its specification.

IV. IMPROPER POST-TRIAL PROCESSING

The final assignment of error we discuss in detail is the improper preparation of the Staff Judge Advocate's Recommendations to the convening authority (SJA Recommendations) by the assistant trial counsel, Major D. This was contrary to Article 6(c) and R.C.M. 1106(b). Under the circumstances of the instant case, we find this statutory violation to have been waived, and we find no plain error.

The allied papers of the record of trial reflect the SJA Recommendations were duly served on trial defense counsel as required. R.C.M. 1106(f). In the post-trial submissions, trial defense counsel did not assert the existence of any errors in the SJA Recommendations. He limited

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[10] *See* Article 92(3), UMCJ (10 U.S.C. § 992 (3) (1988).

his submissions to a clemency request on behalf of appellant. Failure to specifically note patent errors in the SJA Recommendations constitutes a waiver of those errors. R.C.M. 1106(f)(6). R.C.M. 1106(f)(6) does not exempt any particular errors from its waiver provision.

Although the post-trial processing with which we are involved is deemed part of an accused's military due process rights, such rights are not immune to waiver. We previously have held that constitutional rights may be waived just as statutory rights and other benefits. *United States v. Lucas*, 19 M.J. 773 (A.F.C.M.R. 1984), *aff'd*. 25 M.J. 9 (C.M.A. 1987), *cert. denied*, 484 U.S. 1027 (1988) (failure to object at trial to improper use of immunized testimony held waived on appeal).

Having deemed the error waived, we test for plain error and find none. First, Major D's handiwork did not go directly to the convening authority. The staff judge advocate also signed the SJA Reccommendations and certified he had reviewed the record of trial and recommendation, and concurred. *See United States v. Grinder*, 28 M.J. 840, 843 (A.F.C.M.R. 1989). Second, the SJA personally prepared and signed the Addendum to the SJA Recommendations, which was the response to trial defense counsel's R.C.M. 1106(f) response. Thus, we conclude the interests of justice do not require a new SJA Recommendation and convening authority action.

It begs the issue to state these type errors are very easily avoided. No one should be more aware of a statutory disqualification than the disqualified person him or herself. In the instant case, Major D should have been aware of and voiced his disqualification when asked to prepare the SJA Recommendations. Failure to detect and avoid such rudimentary errors contributes to the many instances of the Courts of Military Review having to remand otherwise valid convictions.

V. REMAINING ASSIGNMENTS OF ERROR

We have considered the other assignments of error and resolved them adversely to appellant. *McNeil v. Wisconsin*, ____ U.S. ____, 111 S. Ct 2204 (1991); *United States v. Lewis*, 33 M.J. 758 (A.C.M.R. 1991); R.C.M. 1001(a)(1)(a); Mil. R. Evid. 103(a)(1); *United States v. Martin*, ____ M.J. ____A.F.C.M.R. 1993).

VI. CORRECTIVE ACTION

In view of Part IV-B, *ante*, we must determine whether remand for a rehearing on sentence only, or sentence reassessment is appropriate. Our review of the record convinces us that we can reassess the sentence to reflect what sentence appellant would have received had he not been charged with the failure to obey a lawful order not to consume alcohol. *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990). We believe the members viewed the two escapes from correctional custody as the gravamen of appellant's misconduct. Reassessing on that basis, we find appropriate only so much of the sentence as provides for a bad-conduct discharge, 4 months confinement, and reduction to E-1.

VII. DECRETAL

The findings on Charge I and its specification are disapproved, and Charge I and its specification are dismissed. The findings and sentence, as modified, are correct in law and fact, Article 66(c), UCMJ, and are hereby,

AFFIRMED

Chief Judge DIXON, Senior Judges O'HAIR and MCLAUTHLIN, and Judges GRUNICK and HEIMBURG concur.

HEIMBURG, Judge (concurring):

I concur in the opinion of Judge Snyder, and write separately only because I believe it necessary to mark out more clearly the boundary between the majority and the dissent concerning Charge II.

The opinions in this case have revealed significant differences of opinion on the nature of "physical restraint" in correctional custody. Without minimizing these differences, it is important to note that the Court's decision does not require adoption of one of the conflicting views. The Court does not today decide whether correctional custody automatically includes physical restraint or authorizes physical restraint to be imposed by competent authority. Nor does it define what physical restraint may be required if not automatically included—whether it requires some physical means of restricting the correctee's movements or may be assumed to exist when proper limits are defined in a designated building or other facility. Most importantly, this case does not decide that the *status* of being in correctional custody equates to the *fact* of being under physical restraint.

The issue we addressed was whether a guilty plea was provident. What most divides the majority and minority on that issue are the assumptions each brings to a review of the providency of a guilty plea to escape from correctional custody. One of the "assumptions" of which I speak concerns the meaning of the term "correctional custody." Each of us carries mental images which color and give meaning to the words we *see* when we read a record of trial. If appellent had been confined rather than in correctional custody, his offhand or flippant remarks to the court, "there's no security in that place whatsoever. . . . I went out through the back door" would not have been viewed as contradicting his plea of guilty. It is because judges know of Air Force correctional Custody facilities which have "no security . . . whatsoever" that these words immedi-

ately raise questions: What kind of facility was he talking about? Was there any real security? Having such questions does not equate to "matters inconsistent" with a guilty plea. Unless something an accused says raises a defense or undercuts an element of the offense, we should not consider the plea improvement just because we would like to know more facts which, were the case litigated, would be necessary to proof. *United States v. Logan*, 22 U.S.C.M.A. 349, 47 C.M.R. 1 (1973); *United States v. Bennette*, 35 M.J. 58 (C.M.A. 1992); *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991). Otherwise, we will be in danger of nullifying the stern warning each trial judge gives a person about to plead guilty:

> A plea of guilty is equivalent to a conviction and is the strongest form of proof known to the law. On the basis of your plea alone, and without receiving any evidence, this court could find you guilty of the offense(s) to which you plead guilty.

Department of the Army Pamphlet 27-9, para. 2-9. *See also*, Article 45, U.C.M.J., 10 U.S.C. § 845.

An objective look at what appellant told the court about the escape shows the providency of his pleas. He first acknowledged that he understood the elements, including the element that, "while in correctional custody, you were under physical restraint." Appellant told the court there was a "monitor" in the correctional custody facility whose permission he needed to leave. The presence of a monitor who has the duty and means to prevent departure can equate to physical restraint, for the monitor equates to the "custodian." Manual for Courts-Martial, 1984, Part IV, para. 70c(1). Appellant told the military judge he left the correctional custody facility on both occasions without obtaining permission to do so: the first time he "snuck out" and the second time he "left through the back door" while the monitor was otherwise occupied.

At that point, appellant had given the court sufficient information to support his guilty pleas, but my dissenting brothers find inconsistency in subsequent statements he made during his unsworn statement. Let's examine them, also. In a colloquy with his defense counsel, appellant was explaining his actions in escaping from correctional custody. Concerning the first incident, appellant explained that it was "bad, being in there" all alone, and he was bored, he "needed just to, to explode." How did he get out? "—[T]here's no, there's no security in that place whatsoever. It's just, I went out through the back door." He came back several hours later, and "nobody knew anything about it." This is the same incident in which, according to the stipulation of fact appellant agreed to, appellant told a NCO he saw at a casino downtown, "between me and you I just snuck out of CC."

Apart from one's assumptions regarding what sort of correctional custody facility this must have been, appellant's comments during his unsworn statement raised no inconsistency whatever with his guilty plea. Sneaking away from a guard, custodian, or "monitor" is not inconsistent with the presence of physical restraint; indeed, were there no physical restraint sneaking would be unnecessary.

Another assumption that divides this Court is the weight to give to an accused person's assent to the terms used by the military judge to explain the elements of the offense. I am prepared to assume that appellant understood the term "physical restraint;" this term is not a legal term of art requiring advanced education to understand. Thus, despite the conclusory nature of the military judge's inquiry, it established a factual basis for appellant's plea. *See*, R.C.M. 910(e); *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

By his pleas, agreement to a stipulation of fact, and response to questions by the military judge, appellant

gave this Court an adequate basis for upholding his conviction of escape from correctional custody. We should not require proof of facts in a guilty plea case when no factual dispute exists. Believing appellant's pleas to Charge II provident, I join the majority in upholding his conviction and sentence.

Judge JAMES, with whom Senior Judge LEONARD and Judge JOHNSON join (concurring in part and dissenting in part):

We dissent from the majority's disposition of the conviction for escape from correctional custody.[1]

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[1] This case was originally decided by panel 3 of this Court, consisting of Senior Judge Leonard, Judge Johnson, and me. The panel voted and agreed on an opinion that set aside all the findings of guilty. During "off panel" circulation, an "off panel" judge suggested *en banc* consideration. The majority of the Court agreed, and the Court *en banc* the formed a majority for the current disposition.

There was a time when a panel's decision in an individual case could not legally be overturned by the Court sitting *en banc*. *United States v. Chilcotte*, 20 U.S.C.M.A. 283, 43 C.M.R. 123 (1971); *see, e.g., Coleman v. United States*, 21 U.S.C.M.A. 171, 44 C.M.R. 225 (1971); *Maze v. Army Court of Military review*, 20 U.S.C.M.A. 599, 44 C.M.R. 29 (1971); *United States v. Wheeler*, 20 U.S.C.M.A. 595, 44 C.M.R. 25 (1971). This result, based on statutory construction, was changed by the Military Justice Act of 1983, 97 Stat. 1402, which amended Article 66 (a) to provide for *en banc* reconsideration of any panel decision in accordance with the Court's rules. S. Rep. No. 53, 98th Cong. 1st Sess. 28 (1983), as quoted at *United States v. Flowers*, 26 M.J. 463, 465 (C.M.A. 1988) (q.v.).

Rule 17 of the Courts of Military Review Rules of Practice and Procedure, 22 M.J. CXXVIII, provides that such reconsideration "ordinarily will not be ordered except (1) when consideration by the full Court is Necessary to secure or maintain uniformity of decision, or (2) when the proceedings involve a question of exceptional importance, or (3) when a sentence being reviewed . . . extends to death." There was no conflict among decisions of different panels on any issue in this case, and the punishment obviously does not extend to death.

The Court divides on the requirement for "physical restraint" to sustain a conviction for escape frm correctional custody. The majority's lexicographical highjinks assume away an element of proof. The majority is willing to infer the presence of physical restraint simple from the status of custody. Its theory for its disposition avoids any analysis of the extent to which there were replies given by Airman Felix during the "providency inquiry" that were inconsistent with his concession that he was under "physical restraint." The majority lives in an Aristotelian world of pure, symbolic logic in which it assumes a state of the legal universe without bothering to look out the window to see whether its belief has any real connection with reality.

Now it is, regrettably, our job to throw bricks through its window. To establish our view, we first review the requirement that a military judge inquire into matters incon-

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One might question whether such a subjective standard as "exceptional importance" is so devoid of discernible criteria as really to constitute *no* rule. Were that the case, such a judicial mugging as this one would be in violation of the statute's "in accordance with rules" clause. Presumably the *Chilcotte* result would follow necessarily.

The decision of the majority to reconsider this case *en banc* can be justified only on the basis that this is a case of exceptional importance, and it demonstrates that the standard in the rules is interpreted by this Court as broad enough to cover any situation where the majority disagrees with a panel's decision. The question of how to properly charge offenses against correctional custody meets no plausible standard of "exceptional importance."

Surely this excursion into a seldom visited back alley of military justice is not what the Congress and the Judge Advocates General had in mind when they gave us permission to shoot our toes off. The Court of Military Appeals indicated in *Flowers* that it was concerned with proper compliance by the Courts of Military Review with Rule 17. The extent to which such concern may be the basis for relief to an appellant remains an open question.

sistent with a plea of guilty, for that is the legal turning point in this case. Next we note the diversity in the use of correctional custody, for it accounts for much of the dispute. Then we look at the elements of the offense to highlight the pivotal difference between infractions against moral restraint and infractions against physical restraint. Finally, we review very briefly the law relating to escapes from confinement, for it explains how the majority could possibly come to such a result.

I. MATTERS INCONSISTENT WITH PLEA OF GUILTY

Whenever a plea of guilty is offered, the military judge must "inform the accused of . . . the nature of the offense." R.C.M. 910(c)(1). The elements of that offense should be described. *Id.*, Discussion. The military judge must then determine the accuracy of the plea by inquiring into the underlying facts. R.C.M. 910(e). When the accused makes statements inconsistent with the offered plea of guilty, the military judge must resolve the inconsistency or enter a plea of not guilty for the accused. Article 45(a), UCMJ, 10 U.S.C. § 845(a) (1988); R.C.M. 910(h)(2); *see generally United States v. Logan*, 22 U.S.C.M.A. 349, 47 C.M.R. 1 (1973). *Logan* corrects the mistaken view in some prior decisions that a "mere possibility" of inconsistency required that the plea be rejected and substitutes the "substantial conflict" test which now prevails. *See, e.g., United States v. Prater*, 32 M.J. 433 (C.M.A. 1991). Nonetheless, we emphasize that the "inconsistency" rule is statutory, not something cooked up in the wild imagination of soft-hearted appellate judges. It deserves to be applied as it was intended to be applied, not subverted. Momentarily we conclude that such a substantial conflict occurred in this case, but first we address the nature of offenses against correctional custody so that the occurrence of the conflict can be understood in its context.

II. WHAT DOES CORRECTIONAL CUSTODY LOOK LIKE?

The central disagreement in this case arises because the majority views correctional custody as necessarily including physical restraint. Just as the majority says, correctional custody is defined by the President as "physical restraint of a person." Manual For Courts-Martial, United States, 1984 (MCM), Part V, paragraph 5c(4). The majority stops there—thus it is defined and thus it must have been—and lets its dictionary of common military justice terms govern reality. Conversely, we take notice that the implementing practices vary.

Thus, Judge Quinn once remarked, "As I assess correctional custody it resembles restriction so much more than confinement that it . . . does not . . . fall within *Argensinger*'s [12] prescription of the right to appointed counsel." *United States v. Shamel*, 22 U.S.C.M.A. 361, 362, 47 C.M.R. 116, 117 (1973). He compared it "to the practice of 'detention' after school." *Id.*. In the 1960s our Army brethren imposed correctional custody on a particularly slippery soldier:

> *Various moderate restraints* of the accused's freedom of movement were ineffectual and, eventually, he was placed in a locked room on the third floor of the company barracks. He escaped.

United States v. Carson, 15 U.S.C.M.A. 407, 35 C.M.R. 379, 380 (1965) (emphasis). What is notable is not that the miscreant was eventually locked up in correctional custody but is instead that he was not locked up until less severe restraints failed successively. More recently, at least, the Army's regulation "mandate[d] the use of moral, rather than physical, restraint in correctional custody facilities."

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[12] *Argesinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel when confinement results).

United States v. Kellner, 16 M.J. 524, 525 (A.C.M.R. 1983). *Cf. United States v. Shamel*, 22 U.S.C.M.A. 361, 47 C.M.R. 116 (1973).

The Air Force implementing regulation does not state the required circumstances of correctional custody, but it provides, "Normal troop housing may be adapted to correctional custody use by physically defining an area for such custody." Air Force Regulation 125-35, *Correctional Custody*, paragraph 4a (4 Septembet 1981). Of course, the physical definition could be a line painted on the floor. The same provision also contemplates use of jails, but we take notice that there are Air Force correctional custody programs which do not feature the jail-like setting that the Manual's definition implies.

An earlier example of such an Air Force facility was described in *United States v. Blosser*, 35 C.M.R. 902 (A.F.B.R. 1965):

> When accused was first placed in the . . . correctional custody facility he was informed by the NCOIC thereof he must not leave the building without permission, and whenever he did leave he was to "sign out" in the logbook on the first sergeant's desk, and when he returned he was to "sign in." He received and acknowledged reading and understanding a copy of the "Correctional Custody Rules & Regulations" which, among other things, purported to require him to sign out or in whenever he departed or entered the building (confinement facility) and to prohibit his consumption of alcoholic beverages.

Id. at 906. Blosser left the facility *with permission* to serve as a firewatch and failed to return. Instead, like Airman Felix, he went into town to drink. Blosser was correctly charged with and convicted of breach, not escape. Though his departure is different from that of Airman Felix, we

do not know how the majority would avoid calling the *Blosser* episode an escape, relying as it does on literal application of the President's definition, and yet it is clear that no physical impediment governed Blosser's movements after he left the facility.

In such facilities, the offender may still be obliged to stay unless permitted to leave, but the obligation is imposed by an order, and it is a moral obligation, not a physical restraint. *See, e.g., Kellner*, 16 M.J. at 525.[13] *Physical* restraint is required to constitute escape, as we see below.

III. ELEMENTS

The Manual describes two approaches to pleading the offense involved in unauthorized flight from correctional custody.[14] One not acquainted with variations in the conditions of correctional custody might overlook the distinction between physical and moral restraint and select the wrong approach. One is *escape* from physical restraint, appropriate for instances like that in *Carson*, and the other is *breach* of any other form of restraint, e.g., the moral duty to remain in custody unless released.[15] MCM, Part IV, paragraph 70b, c (1984).

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[13] Neither stone walls nor iron bars are required to make a correctional custody facility, though they are not inconsistent with the idea. However, their functional equivalents are required to make an escape possible. *Cf. United States v. Ellsey*, 16 U.S.C.M.A. 455, 37 C.M.R. 75, 79 (1966) (prisoner ordered into confinement escaped from escort while in route to facility did not escape from confinement but breached custody).

[14] *See generally United States v. Riedel*, 37 C.M.R. 801 (A.F.B.R. 1966).

[15] *See, e.g., Mackie*, 36 C.M.R. 171-72; *United States v. Blosser*, 35 C.M.R. 902, 906 (A.F.B.R. 1965); *United States v. Baker*, 35 C.M.R. 916 (A.F.B.R. 1965).

Breach and escape are different. Each includes as an element of proof the nature of the restraint imposed and violated. *Id.* The maximum confinement which may be adjudged for an escape is *double* that which may be imposed for a breach. *Id.* at 70e. Perhaps for that reason the elements of proof of an escape require the prosecution to prove that "while in such correctional custody, the accused was under *physical* restraint" and that "the accused freed himself . . . from the *physical* restraint." *Id.* at 70(1)(b)-(c) (emphasis added). In contrast, the elements of a breach are satisfied simply by proof of "a certain restraint." *Id.* at 70b(2)(b). We are happy that we are not obliged to account for the mysterious presence of the breach specification if, as the majority contends, one who is put into the status of correctional custody is necessarily, *ipso facto*, thereafter under physical restraint. There is no explanation. If one follows the majority's definitional logic, correctional custody always entails physical restraint, and the breach specification has no use.

We would have thought that the Manual's statement of the elements would have been enough to dispose of this case: Some proof is required that there was *physical* restraint, and, in a guilty plea case, some inquiry is required when the accused gives replies inconsistent with the existence of physical restraint. Moral suasion is not enough to prove an escape, though it is satisfactory for proof of a breach.

Given the diversity in implementing correctional custody, the President's definition (correctional custody is physical restraint) does not substitute for facts. After all, it is perfectly possible that his subordinates deviated from his expectations when they implemented the authority to impose correctional custody. That is not in the least a surprise, for one must be careful about confining citizens

without trials. While the constitutional and military due process aspects were touched in *United States v. Mackie*, 16 U.S.C.M.A. 14, 36 C.M.R. 170 (1966) and *United States v. Shamel*, 22 U.S.C.M.A. 361, 47 C.M.R. 116 (1973), there is always the threat of legislative responses if correctional custody is too often too strenuous. Thus, it is easily understood and perhaps commendable that the President's subordinates have not uniformily instituted correctional custody with all the rigor that he seems to have believed lawful. With Congress ever watchful, sometimes authority lawfully had is best not exercised to its limits, lest perceptions of abuse result in the authority being taken away.

Despite our discussion of what we believe to be a differing perception of the world of correctional custody, the majority assumes that physical restraint follows in proof by logical tautology. In contrast, we would hold that assumptions are not good enough to satisfy an element of proof that doubles the maximum punishment. Not all correctional custody necessarily involves physical restraint, regardless of the Manual's definition. Where the offender is not shown to have been behind locked doors or similar physical restraint, as is sometimes the case in Air Force facilities, there may still be an offense committed when the offender leaves the facility, but the offense is breach, not escape.

IV. THE ESCAPE PRECEDENTS

One must ask how the majority—reasonable judges all—could possibly get this so wrong as we in the minority contend. We should avoid speculation about the majority's thought process, but in this case it has been fairly overt. The majority analogizes from some of the cases involving escapes from confinement under Article 95,

UCMJ, 10 U.S.C. § 895 (1988). We think that is unwise, for those cases are treacherous, too, badly in need of careful reconsideration. When the touchstone for an analogy is faulty, one should do without.

There is an oft-repeated doctrine that a prisoner remains in "physical restraint" even when outside the jail if accompanied by an escort who—even unarmed—has the means and duty to oppose flight. *See, e.g., United Stares v. Hodge*, 50 C.M.R. 445 (A.F.C.M.R. 1975). We have no fight to pick with the general idea that an escort can supply the physical restraint that is otherwise lacking outside a jailhouse, but, as one might expect, prior cases have offered many an opportunity to find the limits of that doctrine. For example, in *United States v. Cornell*, 19 M.J. 735 (A.F.C.M.R. 1984), our predeccesors affirmed a conviction of escape from confinement where the prisoner—in minimum custody—was permitted to go out of the jail unescorted to a gym, from whence he fled without authority. *Cornell* was based on *United States v. Maslanich*, 13 M.J. 611 (A.F.C.M.R. 1982), *pet. denied*, 14 M.J. 236 (C.M.A. 1982), in which a panel of this Court explicitly overruled with only momentary analysis the precedent inconsistent with its view of the law relative to "physical restraint."

One might well criticize *Cornell* and *Maslanich* as confusing the *status* of confinement with the *fact* of physical restraint, both of which appear to be required in an escape from confinement. That is exactly the flaw in the majority's approach in this case, explicitly stated in its opening. As the clarity of the distinction between the two has been reduced, we seem in *Cornell* to have gotten to the point that proof of one element (physical restraint) may be inferred from proof of the other (status of confinement), regardless whether the facts of the prisoner's life were congruent with that inference. To put it even more bluntly,

Cornell and *Maslanich* lure one seductively into *assuming away* a distinct requirement for proof of "physical restraint." Such a flawed approach warrants reconsideration.

Regrettably, neither *Cornell* nor *Maslanich* make a persuasive brief for such a position.[16] Lacking sound

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[16] *Maslanich* joined the assessment of some sister-service decisions that the precedents are not consistent. 13 M.J. at 613 n.1, 614 n.3. It is certainly true that the prior decisions offered an interesting variety of outcomes, but it seems something of an exagerration to view them as too hopelessly splintered ever to be reconciled. *See generally United States v. Hodge*, 50 C.M.R. 445 (A.F.C.M.R. 1975) (physical restraint outside the facility depends on a guard who has the "means and the duty . . . to oppose" escape); *United States v. Seelke*, 45 C.M.R. 631 (A.C.M.R. 1972), *pet. denied*, 21 U.S.C.M.A. 648, 45 C.M.R. 929 (1972) (record silent about instructions to unarmed escort, instructions to call "halt" are not enough); *United States v. Dees*, 45 C.M.R. 891 (N.C.M.R. 1972) (proof of physical restraint adequate where guard had a duty to oppose escape, but left prisoners unsupervised momemtarily); *United States v. Roberts*, 43 C.M.R. 998 (A.F.C.M.R. 1971) (plea to escape not improvident where prisoner on work detail hopped off truck); *United States v. Hahn*, 42 C.M.R. 623 (A.C.M.R. 1970) (no escape where no evidence that guard has means or duty to do more than cry "halt"); *United States v. Hamilton*, 41 C.M.R. 724 (A.C.M.R. 1970) (mere requirement that a guard cry "halt" does not constitute physical restraint); *United States v. Faist*, 41 C.M.R. 720 (A.C.M.R. 1970) (escape set aside where parolee on work detail given permission to go unsupervised to a latrine, the left); *United States v. Connor*, 40 C.M.R. 614 (A.C.M.R. 1969) (physical restraint adequately shown where jumped out a window while momentarily out of sight of a guard who had orders to shoot); *United States v. Laurie*, 37 C.M.R. 663 (A.B.R. 1967) (guilty plea to escape set aside where prisoner was released without supervision for detail); *United States v. Silk*, 37 C.M.R. 523 (A.B.R. 1966) (physical restraint continues outside prison if guard has means and duty: no restraint where prisoners at work in dining hall could not all be watched at once); *United States v. Sines*, 34 C.M.R. 716 (N.B.R. 1964), pet. denied, 14 U.S.C.M.A. 697, ____ C.M.R. ____ (1964) (unarmed guard with instructions to refrain from chasing was not "physical

restraint"); *United States v. Morrison*, 33 C.M.R. 899 (A.F.B.R. 1963), *pet. denied*, 14 U.S.C.M.A. 681, 33 C.M.R. 436 (1963) (escape affirmed where guard had means and duty; ineffectiveness immaterial); *United States v. Ramsey*, 33 C.M.R. 566 (A.B.R. 1963) (no escape where minimum custody prisoner walks away with permission of KP supervisor but does not return, supervisor has no duty to do more than "try to talk him out of it" and trail); *United States v. Morgan*, 32 C.M.R. 665 (A.B.R. 1963 (escape affirmed where prisoner under loose supervision of cook went outside to clean grease racks, the left unimpeded, because cook had means and duty, even though ineffective); *United States v. Vincent*, 24 C.M.R. 506 (N.M.B.R. 1957) (escape affirmed, physical restraint continued where prisoners taken outside prison were left unsupervised in a lounge first for 30 minutes, then a few more); *United States v. Block*, 18 C.M.R. 458 (C.G.B.R. 1955) (escape affirmed, physical restraint found where prisoners detailed to boiler room of brig were not always in sight of unarmed supervisor who has means and duty, because relaxed vigilance was still enough given that the site was on a base); *United States v. Hunker*, 18 C.M.R. 703 (A.F.B.R. 1954) (custody & confinement distinguished: where commander ordered accused into confinement, accused escaped while en route, held to be an escape from confinement!); *United States v. Stewart*, 17 C.M.R. 805 (A.F.B.R. 1954) (escape affirmed, physical restraint found where unarmed guard escorted prisoners to chapel, left them outside to look in, whereupon they ran away) (some physical restraint is required, but how much is immaterial); *United States v. English*, 17 C.M.R. 693 (A.F.B.R. 1954) (escape affirmed, physical restraint found where unarmed escort believed he was responsible for prisoners, searched immediately; *Holcomb* distinguished); *United States v. Holcomb*, 16 C.M.R. 537 (A.F.B.R. 1954) (no escape, no physical restraint where unarmed escort had been ordered to touch prisoners, only to call halt: "Moral restraint will not suffice. . . ." at 541); *United States v. Wolfrey*, 15 C.M.R. 768 (A.F.B.R. 1954) escape affirmed where prisoner on detail was left behind when supervisor drove away, but record does not show how far, etc.) (B.R. deferred to trial court's view of the evidence); *United States v. Freeman*, 15 C.M.R. 639 (A.F.B.R. 1954), *pet. denied*, 4 U.S.C.M.A. 734, 16 C.M.R. 292 (1954) (escape affirmed where escorted prisoner was allowed to go unescorted to water fountain, then left: momentary laxity of the guard is a matter of ineffec-

tiveness); *United States v. Lorey*, 14 C.M.R. 393 (A.B.R. 1954) (escape affirmed, physical restraint found where guard armed with shotgun went to sleep: inattentiveness was a matter of ineffectiveness); *United States v. Travis*, 13 C.M.R. 780 (A.F.B.R. 1953) (escape set aside where prisoner given permission to go unsupervised to a latrine the kept going); *United States v. Haddox*, 12 C.M.R. 675 (A.F.B.R. 1953), *pet. denied*, 3 U.S.C.M.A. 838, 13 C.M.R. 142 (1953) (escape affirmed where prisoner was under armed guard but escort was distracted by conversation with hostess); *United States v. Fritts*, 12 C.M.R. 232 (A.B.R. 1953), *Pet. denied*, 3 U.S.C.M.A. 835, 12 C.M.R. 204 (1953) (no fatal variance where accused charged with escape from custody, but evidence showed escape from confinement: accused had been apprehended, then confined, and proof of the confinement included proof of the custody); *United States v. Wesson*, 9 C.M.R. 839 (A.F.B.R. 1953) (no escape where prisoner was left unsupervised to wash car, stole it and drove away: last of the physical restraint abated when car wash supervisor went away for rags); *United States v. Farley*, 9 C.M.R. 753 (A.F.B.R. 1953) (escape set aside where escorted prisoner was told to go alone to x-ray room because escort had too many prisoners, prisoner was the under no physical restraint when he left x-ray room); *United States v. Conner*, 7 C.M.R. 477, 481-82, 482 n.1 (A.F.B.R. 1952) (how restraint continues even where lax so long as not permitted freedom by one with authority); *United States v. Garner*, 7 C.M.R. 446 (N.B.R. 1952) (guilty plea to escape from confinement provident where accused left when working outside supervision of escort outside jail); *United States v. Urquhart*, 6 C.M.R. 445 (A..B.R. 1952) (no physical restraint, therefore no escape where parolee left jail on "trusty pass," went on errand, then fled: only moral restraint involved); *United States v. Wildman*, 6 C.M.R. 406 (A.B.R. 1952) (escape from *confinement* affirmed where prisoner escaped from armed escort en route to jail after approval of adjudged confinement) ("at most an immaterial variance" anyway); *United States v. Fabrizzio*, 6 C.M.R. 623 (A.F.B.R. 1952) (no restraint and no escape where minimum security prisoner signed out, left with permission but without supervision, did not return); *United States v. Owens*, 6 C.M.R. 515 (A.F.B.R. 1952) (minimum custody prisoner left place of work where he was unsupervised: no "physical restraint"); *United States v. Sanches*, 2 C.M.R. 278 (A.B.R. 1951) (physical restraint continued where prisoner on detail outside jail was under guard's supervision); *United States v. Trimble*, 2 C.M.R. 718

arguments, we find it wiser to insist on proof of the element as the law requires than to infer it by such flimsy logic.

(A.F.B.R. 1951) (cannot "suffer escape" when the prisoner has been permitted—even without authority—to go about without guard); *United States v. Noell*, 79 B.R. 117 (1948) (no restraint and no escape where parolee allowed to sign out from jail to duty did so, did not return: moral suasion not equivalent to physical restraint); *United States v. Van Breeman*, 8 B.R. (E.T.O.) 405 (A.B.R. 1944) (escape affirmed where lenient escort let prisoner go to bathroom unescorted: temporary relaxation of vigilance was no "abrogation of status as a retrainer"); *United States v. Humphrey*, 28 B.R. 327 (1943) (moral not substitute for physical) (fence around installation enclosed 28 square miles, was not eqivalent to physical confinement); *United States v. Medlock*, 14 B.R. 69 (1942) (no escape where prisoner was sent out of jail unescorted and unobserved to wash pails in lake, did not return); *United States v. Lowry*, 12 B.R. 309, 311 (1942) (requirement for physical restraint is intended to exclude conviction for escape of prisoner who is paroled to work, does not return) (prisoner in hospital was, according to "very common understanding," not supposed to leave. Not good enough.); *United States v. Smith*, 5 B.R. 155 (1934) (no escape where prisoner did not return when detailed to work outside the jail without supervision) (no "break away from any physical restraint"); *United States v. Gilchrest*, 1 B.R. 297 (A.B.R. 1930) (no "breaking away from physical restraint" where prisoner was sent unescorted outside the jail to fetch ice, did not return). *Maslanich* threw out the baby with the batch of water. It simply assumed away the proof requirement as to physical custody because it found it too difficult to follow the precedent about prisoners who were outside the jail. It would have been better simply to require proof. Instead, the *Maslanich* court changed the doctrine to conform to its taste for simplicity and streamlined orderliness. That is exactly where we are in Airman Felix' case. The Court of Military Appeals has not visited the extremes to which the law of escape have been taken, but the present majority's insistence on taking the same view of escape from correctional custody gives it another chance.

V. THE RECORD

We now turn to the colloquy during the inquiry into the providence of the pleas of guilty. Before we begin, we must set aside what is *not* relevant: It is *not* relevant that Airman Felix knew of the local regulation or that it imposed limits on his liberty. The regulation and his knowledge of it tend to prove only that he was in custody imposed by the moral suasion resulting from a duty to obey. The fact that Airman Felix was induced to agree with the military judge's characterization of his state as "physical restraint" only helps keep this controversy in the majority's Aristotelian world. While this element can be confessed away, the central need in the providency inquiry is to assure that the accused knows what he's talking about when he does so. The inconsistent replies suggest that he didn't, and the military judge should have inquired further.[17]

The inquiries in this case focused on escape because that is what was alleged. However, the record does not make clear the circumstances of the correctional custody from which Airman Felix departed. We might not have questioned it, had Airman Felix not made these statements suggesting that the required "physical restraint" in that facility

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[17] This teapot-sized temptest is a superb example of the ripple effects of a trial judge's use during the providency inquiry of leading questions in which legal conclusions were embedded, calling upon the accused to subscribe to each. That style makes for a fast inquiry and a thin record, but it also seduces the participants into an assuredly false and obviously dangerous sense of security. If we may be excused a little speculation, we think it likely that if this trial judge had simply had a brief conversation with Airman Felix about life in this facility, we would never have had any cause to become so embroiled in such an unproductive controversy as such a great expense. Either the inconsistency would have been dispelled or, at the very worst, the prosecution would have been put to the test.

might have been absent. At one fleeting passage as to one of his two absences, he explains that he went out the facility's back door. There is no hint that any force or deception or a locksmith's skill was required, and so we cannot infer that Airman Felix was then under physical restraint. There is nothing to explain how he got out on the other occasion or the circumstances of the custody on that occasion. While Airman Felix gave the needed "yes, sir" responses to the military judge's questions, it is clear that neither the military judge nor Airman Felix were discriminating between physical and moral restraint. Yet, in the one brief reference to the conditions of custody, Airman Felix said that he just walked out the door. Later, during sentencing, he told us that there was no security in the facility at all. Those replies are inconsistent with his agreement that he was under physical restraint. Such an inconsistency left unclarified causes a substantial conflict between the plea (guilty of escape from physical restraint) and Airman Felix' description of the circumstances of the correctional custody in his case (just walked out the door).

The participants at trial did not notice the distinctions between offenses against correctional custody and, naturally, did not notice the inconsistency and therefore did not resolve it. The plea was not shown to have been provident. The findings under Charge II should have been set aside.[18] Article 45(a), UCMJ, 10 U.S.C. § 845(a) (1988).

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[18] We have no opportunity to rescue this charge by approving a finding of guilty to a breach as if it were a lesser included offense, even though it is fairly apparent that, had breach been pleaded, the plea would likely have been provident. While moral suasion is less onerous than physical imprisonment, a breach of custody is not necessarily a lesser included offense of an escape. *United States v. Greene*, 42 C.M.R. 953, 959 (A.F.C.M.R. 1970), *rev'd on other grounds*, 20 U.S.C.M.A. 232, 43 C.M.R. 72 (1970). *But cf. Kellner*, 16 M.J. 524)

VI. THE MAJORITY'S REMEDY

Even if we were somehow disposed to accept the majority's view of escapes from correctional custody, we could not join its disingenuous disposition of this case. Airman Felix, though hardly a model airman, was convicted only of the escape which the majority now affirms and the disobedience of the local correctional custody regulation, which we all agree must be set aside. For those two convictions he was sentenced to a bad-conduct discharge, confinement for 5 months, and reduction to E-1 from E-2. To remedy a wrongful conviction of half the charges in this case, the majority proposes now to reduce the confinement 20 percent to 4 months.

Holding as we do the view that the other conviction must also be aside, we are not obliged to set down our view of what would constitute an appropriate remedy for the majority to decree, for we would necessarily set aside the whole sentence. Still, we can record the dire straits in which the majority finds itself. It can't bring itself to give meaningful relief for what all agree was a wrongful conviction. It ran out of remedial options that it finds acceptable.

Restoring the reduction would result in back pay, yet we cannot calculate the money value of such relief because we have no idea how long such a poorly disciplined airman might have remained in pay status on active duty. *See*

(plea to escape found improvident in breach situation, breach affirmed where military judge's inquiry included breach); *United States v. Whitmire*, 13 M.J. 587 (N.M.C.M.R. 1982) (specification of escape amended at trial to allege breach). The two elements are different, not inclusive of one another. Unlike the military judge in *Kellner*, the military judge in this case did not advise Airman Felix about the elements of breach except superficially and did not inquire into facts about breach. Thus, the inquiry requirement would remain unsatisfied in either case.

Article 76a, UCMJ, 10 U.S.C. § 876a (1988) (required leave). In short, we can't tell how much relief would result from setting aside the reduction. Furthermore, reduction in grade is an appealing and somehow just punishment for the irresponsibility shown in this case, if like the majority one can find a sound conviction resulting from it. Setting aside the punitive discharge would certainly be adequate (perhaps even excessive) compensation for the error and for whatever loss of liberty was attributable to it, but the majority has, for whatever reason, found that to be inappropriate.

Most trying in the whole process is the mandate of the Court of Military Appeals that, when reassessing a sentence to correct an error, we must first determine whether we can determine what the trial court "would probably have adjudged' had the error not occurred. *United States v. Peoples*, 29 M.J. 426, 427 (C.M.A. 1990). *See also United States v. Sales*, 22 M.J. 305, 307-308 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). *See Generally, United States v. Waits*, 32 M.J. 274, 276-77 (C.M.A. 1991). When we can't tell, we are not supposed to guess, as we think the majority does. We are supposed to remand.

That is a tricky bit of mind-reading in any case, but in some it is sound logic than speculation. For example, we know that an officer-accused stands a very good chance of being dismissed from the service upon conviction of any substantial crime, and we are not surprised when we see dismissal alone adjudged and then approved even when only one of several convictions can be sustained on appeal. When we must reassess in such a case, we can often conclude, to the satisfaction of our conscience, that the dismissal was inevitable even had the affected specifications never been referred. In other cases a particular component of the sentence can be directly tied to a specifica-

tion, as when the court-martial adjudges a fine in exactly the amount the accused was convicted of stealing. If the larceny conviction must be disapproved but others remain, we can tell at least that the fine should go.

This is not such a case. One cannot say reliably enough to satisfy my conscience that the escape alone produced the punitive discharge, the reduction, and 4 of the 5 months of confinement. The majority is simply guessing, and, to make it much worse, their guesswork is deplorably parsimonious.

The majority's remedy is neither adequate nor effective, because the appellant served all the confinement long ago and has presumably been released. The sentence was adjudged on 25 February 1991, now nearly 2 years ago, and only truly extraordinary circumstances would have prevented the confinement from being served. None of it should remain to be abated by the majority's ungenerous treatment. Thus, our appellate inefficiency gave the majority a Hobson's choice, and it chose nothing.

One might argue that there are collateral consequences to disapproving confinement already served, but we are unacquainted with them, they are not in the record, and we can only speculate what they might be and how reliable the government might be in delivering them up to the appellant. Ignoring them as we must, we can only conclude that the majority has tried to give back the one thing that can never be given back in a non-capital case: liberty deprived. It is a futile and tight-fisted gesture, inadequate to the purpose, and born of speculation. This case should be remanded for a rehearing on the sentence, even if one agrees with the majority's disposition of the convictions.[19]

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[19] We refrain from detailing our disagreement with the majority's treatment of the identity of the staff judge advocate's ghostwriter. In our view, all that should matter is that the staff judge advocate signed

JOHNSON, Judge, with whom Judge JAMES joins (concurring in part and dissenting in part):

I concur with the majority's decision to set aside appellant's conviction for failure to obey a lawful order. I join Judge James in dissenting from the majority's decision to affirm appellant's convictions for escape from correctional custody, and from the majority's remedial action.[20]

Correctional custody is listed in Article 15(b)(2), UCMJ, as an authorized punishment for nonjudicial punishment actions, and it is there defined as "the physical restraint of a person during duty or nonduty hours . . . ." This language can either be interpreted as meaning that a person ordered into correctional custody is therefore automatically under physical restraint, at least when he is in a designated correctional custody facility, or it can be read as an authorization for physical restraint to be imposed by competent authority. The majority has apparently taken the former view, with which I disagree.

Further, the term "physical restraint" may be taken to mean either physical means limiting one's movements (such as locked doors, fences, or the presence of an escort or monitor with the duty and means of limiting one's liberty), or it may be taken to mean the declaration of limits beyond which one may not go. The majority in this case seems to have adopted the latter view, with which I disagree.

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the post-trial recommendations in such a way as to make clear that they were his own advice to the convening authority. Who served as scrivener or draftsman should be of no real significance.

[20] I also agree that this was not an appropriate case for consideration *en banc* by this Court. Now that the majority of the Court has voted to consider appellant's case *en banc*, however, the merits of that question are not dispositive of our action on the findings and sentence in appellant's case.

The explanation of the offense of escape from correctional custody in MCM, Part IV, paragraph 70c(1) (1984) defines it as the casting off of "any physical restraint imposed by the custodian or by the place or conditions of custody." The words "conditions of custody" can be interpreted either as physical barriers to movement, or as orders not to depart from certain limits. The majority in this case seems to have adopted the latter view. I disagree.

In MCM, Part V, paragraph 5(c)(4) (1984), the President has authorized the Secretaries of the service departments to prescribe the conditions under which correctional custody is to be administered in each service. The Secretary of the Air Force, in Air Force Regulation 125-35, *Correctional Custody* (4 September 1981), has given major commands and installation commanders wide discretion in establishing and operating correctional custody programs. Some Air Force installations have no correctional custody program, or send participants to other installations for correctional custody. Those installations that do have correctional custody programs vary considerably in the way they conduct their programs. Some have correctional custody facilities in separate buildings with locked doors, security fences, and monitors on duty around the clock. Others are simply portions of normal barracks marked off with tape or signs. The result is that some persons serving correctional custody have physical barriers to their freedom of movement, while others do not.

MCM, Part IV, paragraph 70b (1984), provides for two separate offenses against correctional custody. Escape from correctional custody applies when the offender has cast off physical restraint. Breach of correctional custody applies when an offender "went beyond the limits of the restraint imposed" without casting off a physical restraint. Escape carries a much heavier maximum punishment (dishonorable discharge, total forfeitures, and confinement

for 1 year) than does breach of correction custody (bad-conduct discharge, total forfeitures, and confinement for 6 months).

The majority has decided that any offender who leaves a correctional custody facility without authority can be convicted of escape, even when the evidence indicates there was no phyiscal barrier to movement. I believe this conclusion is contrary to law. If an accused has breached a moral restraint imposed by his placement into correctional custody, he can be convicted of breach of correctional custody. Before he can be convicted of the more serious offense of escape from correctional custody, he must have cast off some physical limit on his movement. If the government charges the more serious offense, it should plead and prove the aggravating facts. When a military judge conducts a providency inquiry for a proposed plea of guilty to escape from correctional custody, he should inquire into the factual basis for the conclusion that physical restraint was present. When an accused says there was no security at all in the correctional custody facility, and that he just walked out the back door, as in this case, the military judge should recognize that the accused has raised matters inconsistent with a plea of guilty to escape. No amount of leading and conclusory questions will substitute for putting the facts on the record.

I would set aside all the findings of guilty in this case and authorize a rehearing on the two specifications of escape from correctional custody.

[SEAL OMITTED]

OFFICIAL

/s/ Naomi D. Allen
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☆ U.S. GOVERNMENT PRINTING OFFICE: 1994—384-508/24006